U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10065637

Date: AUG. 27, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner seeks classification as an alien of extraordinary ability in information technology. See Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not satisfied at least three of the initial evidentiary criteria, as required.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. See Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the decision and remand the matter to the Director.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained

acclaim and the recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. See Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); see also Visinscaia v. Beers, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); Rijal v. USCIS, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

At initial filing, the Petitioner did not claim to have received a major, internationally recognized award under 8 C.F.R. 204.5(h)(3). Instead, the Petitioner indicated eligibility for seven of the ten alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

Subsequently, the Director issued a request for evidence (RFE), informing the Petitioner, in part, that he satisfied two of the initial evidentiary criteria, published material at 8 C.F.R. § 204.5(h)(3)(iii) and high salary at 8 C.F.R. § 204.5(h)(3)(ix). Specifically, the Director stated that "[s]ufficient evidence has been submitted to establish, by the plain language of the regulation, that [these criteria have] been met." In addition, the Director notified the Petitioner that he may submit additional evidence to fulfill the other five claimed criteria.

In the Director's decision denying the petition, he determined that the Petitioner met two other criteria, scholarly articles at 8 C.F.R. § 204.5(h)(3)(vi) and leading or critical role at 8 C.F.R. § 204.5(h)(3)(viii). Further, the Director concluded and explained why the Petitioner did not satisfy the criteria relating to awards at 8 C.F.R. § 204.5(h)(3)(i), membership at 8 C.F.R. § 204.5(h)(3)(ii), and original contributions at 8 C.F.R. § 204.5(h)(3)(v). Although he indicated in the RFE that the Petitioner satisfied the published material and high salary criteria, the Director did not consider them in determining whether the Petitioner fulfilled at least three of the evidentiary criteria, nor did he explain why the Petitioner did not meet them in his final decision.

Accordingly, we will remand the matter to the Director to determine whether the Petitioner satisfies the published material and high salary criteria. If, after considering all of the claimed alternate regulatory criteria, the Director concludes that the Petitioner meets at least three criteria, then the Director must evaluate the totality of the evidence in the context of a final merits determination. See

Kazarian, 596 F.3d at 1115. Furthermore, if the Director concludes that the Petitioner does not fulfill any additional criteria, then he must explain his determination.

III. CONCLUSION

The Director did not consider the Petitioner's eligibility relating to two of the evidentiary criteria. As such, we will remand the matter for further consideration of the record, including claims and documentation submitted on appeal, and entry of a new decision.[1]

ORDER: The decision of the Director, Nebraska Service Center, is withdrawn. The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

[1] We have the authority to withdraw a decision and remand the case for further action, with an order that it be certified back to us if the new decision is adverse to the affected party. USCIS Policy Memorandum PM-602-0087, Certification of Decisions to the Administrative Appeals Office (AAO) 4 (July 2, 2013), https://www.uscis.gov/laws/policy-memoranda, Adjudicator's Field Manual 3.5(c), 10.18(a)(3), https://www.uscis.gov/ilink. This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee. Id.